

1901-032 Chancery Causes: Martha E. Kincaid & vs. Louisville & Nashville Railroad Co.
Lee Co.

Snively, Wheeler, Wynn, Ball

CA-Contract Dispute

T-Property
Transportation

CIRCUIT COURT OF LEE COUNTY,
VIRGINIA.

To the Honorable H. A. W. Skeen, Judge of the said Court:

Your Complainants, Martha E. Kinkaid and B. F. Kinkaid state unto the Court as follows:

That in August, 1889, M. S. Ball was the owner of an undivided eight-ninths interest in and to a certain tract of land lying in Lee County, Virginia, known as the Thomas Ball Farm, and that Mary Bales was the owner of the other undivided one-ninth interest in the said farm; that on the 31st day of August, 1889, said M. S. Ball and Nannie A. R. Ball, his wife, granted and conveyed unto the Louisville & Nashville Railroad Company, a corporation, which will hereinafter be called the Railroad Company, for the purposes of a right of way for its railroad to be built thereafter, a certain strip or parcel of land running through a portion of the said Thomas Ball Farm; that a copy of said deed is filed in this Court, as "Exhibit 2", with the bill in a certain equity suit, where Nannie A. R. Ball and M. S. Ball are complainants and the said Railroad Company is defendant, and is here referred to as part hereof; that while the said Mary Bales only owned an undivided one-ninth interest in the said Thomas Ball Farm, yet she was in possession of a small strip thereof lying on the Eastern side thereof, and on the 30th day of August, 1889, the said Mary Bales granted and conveyed to said Railroad Company for a right of way for its said railroad, a strip of land running through the said parcel of land of which she was in possession; that a copy of the deed last mentioned is filed with the said bill of the said Nannie A. R. Ball and M. S. Ball against said Railroad Company in this Court as "Exhibit 3", and is here referred to as part hereof; that on the 20th day of

which will hereinafter be called Tract No. 2.

January, 1896, the said Mary Bales granted and conveyed her entire interest in the said Thomas Ball Farm unto the said M. S. Ball; that a copy of this deed last referred to is filed with the bill of the said N. A. R. Ball and M. S. Ball against said Railroad Company in this Court as "Exhibit 4", and is here referred to as part hereof; *filed*

that on the 9th day of December, 1898, the said M. S. Ball and N. A. R. Ball granted and conveyed to Complainant, the said Martha E. Kinkaid, a portion of the said Thomas Ball Farm; that a copy of this deed last referred to is filed with the said bill of N. A. R. Ball and M. S. Ball against said Railroad Company in this Court, as "Exhibit 5", and is here referred to as part hereof; *Tract No 2*

That, as will be seen from the aforesaid deed from M. S. Ball and wife to said Railroad Company, they, the said M. S. Ball and wife, reserved the right to use, cultivate and occupy all of the strip of land conveyed to said Railroad Company on each side of the railroad bed which was thereafter to be constructed, as nearly up to the same as could be ^{safely} done, and complainants say that by reason of the deeds aforesaid this right or reservation has passed to and become the property of the said Martha E. Kinkaid;

That for a number of years after 1899 the said Railroad Company respected the aforesaid reservation, and the said M. S. Ball built fences through the said strip of land running through the said Martha E. Kinkaid part parallel to the said railroad bed and up to within a short distance thereof, to-wit, within fifteen or twenty-five feet of the center line of the said railroad, on either side thereof; that the right of the said M. S. Ball to so build the said fences was not, until recently, questioned by the said Railroad Company; that the said fences were built by the said M. S. Ball shortly after his conveyances to the said Railroad Company, to-wit, in the year 1890; and that ever since then, until recently, the said M. S. Ball and Martha E. Kinkaid continued to cultivate,

H use, occupy and enjoy the said right of way ~~from the~~ outside of the said fences as their own, but that recently, to-wit, in the year 1900, the said Railroad Company disputed the right of the said Martha E. Kinkaid to use, occupy, enjoy and cultivate any part of the said strip of land and built a fence on each side of the said railroad at the edge of the said right of way, running entirely through the said Martha E. Kinkaid land and closing in the fences heretofore built as aforesaid thereon by the said M. S. Ball; that it is impossible to satisfactorily cultivate, use and enjoy any part of the said right of way on account of the said last named fences; that the same can not be cultivated without taking a team in between the said railroad and the said fences; and that it is very dangerous to take a team in between the said railroad and the said fences-- dangerous not only to the team and driver, but likewise to the said Railroad Company and persons and freight being hauled thereover; *but for said fences built by said Railroad Company, could* that said right of way [^] can be safely cultivated, used, occupied and enjoyed by Complainants up to within a short distance of the said railroad-bed, to-wit, up to within fifteen or twenty feet of the center line of the said railroad; and that in fact it is an advantage to the said Railroad Company to have said land cultivated up to the said railroad-bed, for the reason that the cultivation thereof prevents the accumulation of dry grass, weeds, briars and other inflammable matter and thus prevents the danger of fire spreading from the sparks of the engines of the said Railroad Company; that the said Railroad Company has done unto the Complainants by the building of the said fences irreparable injury, and that irreparable injury will hereafter be done to Complainants if the said railroad company is permitted to continue the said fences as heretofore built by it; and that the said Company will, unless enjoined, continue to maintain the said fences on the outside edge of the said right of way; and will, unless enjoined continue to prevent said Complainants from

using, enjoying and cultivating any part of the said right of way;

~~that as heretofore shown, Complainant, Martha E. Kinkaid, is the owner of an undivided one-ninth interest in and to the said right of way, and that no partition between the said Railroad Company and the said Martha E. Kinkaid has ever been had of the said right of way;~~

Complainants further say that the said Railroad Company has but one main track running through the said land, and has no switches or side-tracks thereon; and that the said right of way can be safely cultivated, used, occupied and enjoyed by Complainants up to the said railroad-bed, to-wit, to within fifteen or twenty feet of the center line thereof:

Wherefore, Complainants pray that the said Railroad Company be made a party defendant to this bill, and be required to answer same, but answer under oath is hereby waived; that said Railroad Company, its officers, agents, servants and employees be enjoined and restrained from continuing to maintain the said fences or any part thereof, which it has built as aforesaid upon the outside edge of the said right of way, and be enjoined and restrained from building any fence on the said right of way further from the road-bed of said railroad than fifteen or twenty feet from the center line thereof; and be enjoined and restrained from in any manner damaging or interfering with the fences heretofore built upon said right of way by the said M. S. Ball, or any other fences which may hereafter be built on the said right of way by Complainants, provided that such fences be not built closer to the said right of way than fifteen or twenty feet from the center line thereof, and be enjoined and restrained from in any manner interfering with Complainants in the cultivation, use and occupation of the said right of way up to within fifteen or twenty feet of the center line thereof; ~~and that Commissioners be appointed to~~

~~partition the said strip of land between said Railroad Company~~
~~and the said Martha E. Kinkaid; and that she, the said Martha E.~~
~~Kinkaid be assigned one ninth of the said right of way; and for~~
costs, and such other, further and general relief as the nature
of the case may require, and to equity may seem ~~to~~ meet.

Bullitt & Kellogg
P.D.

STATE OF VIRGINIA, County of Lee, to-wit:

I B. C. Campbel a justice of peace
in and for the County and State aforesaid do hereby certify that
B. F. Kinkaid one of the Complainants in the foregoing bill this
day appeared before me, in my county aforesaid, and made oath
that the allegations in the said bill, made of his own knowledge,
are true, and that those made from information derived from others
he believes to be true.

given under my hand, this 16 day of Oct, 1900

B. C. Campbel J. P.

Martha C. Kinkaid, et al.

vs

Bill in Equity

The L. & N. R.R. Co.

1900, 2nd October rules Bill
filed & executed D. N.
" 1st Nov. rules taken
the last Monday in
October D. N. Conf. &
Cause set for hearing.

Plffs Costs

Clerk \$6.20

Shff .50

atly 15.00

J. P. 7.50

N. P. 5.25

wits 6.68

\$41.13

BULLITT & KELLY,

ATTORNEYS-AT-LAW,

BIG STONE GAP AND BRISTOL, VA.

To the Honorable H.A.W.Skeen, Judge of the Circuit

Court of Lee County, Virginia:

The answer of the Louisville & Nashville Railroad Company to a bill exhibited against it in this Honorable Court by Martha E.Kincaid and B.F.Kincaid her husband.

Respondent saving the benefit of its demurrer this day filed to said bill, and relying and insisting thereon, and likewise saving the benefit of all exceptions which can be had or taken to said bill for its many misstatements of facts and errors of law, for answer thereto, or so much as it is advised it is necessary to answer, answering says:

That it supposes it to be true that in August 1889, M.S.Ball, the father of said female complainant, owned a part of a tract of land situated in the County of Lee and known as the Thomas Ball farm, but what interest in said tract of land, whether he owned eight-ninths thereof is not ~~not~~ known to Respondent. But Respondent denies that the interest said Ball had in said tract of land, whether eight-ninths or more or less, was an undivided interest, and this allegation of said bill is not only emphatically denied but it is expressly contradicted and refuted by the two deeds executed on the 31st day of August, 1889, by the said M.S.Ball and wife to this Respondent, copies of which said deeds are alleged to be, ~~but are not~~, filed as exhibits with the bill of Mrs.Nannie A.B.Ball and her husband against this respondent. When said deeds are filed ^{in this cause}, if they are filed, it will be seen that one of the tracts of land through and over which the said M.S.Ball and wife conveyed strips of land to this Respondent for a right of way lies on the west and the other on the east of lands described in said deeds as belonging to Mary Bales who also conveyed to this Respondent a strip of land for a right of way through the lands so held and owned by her. And it will be further seen by an inspection of said deeds that the said M.S.Ball and wife in each convey to the lines of the land of the said Mary Bales thus recognizing that said land ^{which} formerly belonged to Thomas Ball had been partitioned between the said Mary Bales and the said M.S. Ball, and Respondent is advised that as the said M.S.Ball thus recognized said partition at the time he made said conveyance and after-

wards stood by and saw Respondent erect costly improvements on the strips of land conveyed to it by him, as well as the strip conveyed to it by Mary Bales, that he and his vendee are each estopped from denying that said land had been regularly partitioned. And Respondent further avers that said deed for the strip of land conveyed by the said M.S. Ball to it, lying on the west of the Mary Bales land is a direct conveyance by the said Ball of a strip of land through a tract of land owned by him as an entirety and in fee simple, and not of a tract of land in which he owned an undivided interest.

Respondent is informed and it avers it to be true that Mary Bales, who is mentioned in said bill was a daughter of the said Thomas Ball and that she owned an interest, but whether one-ninth or not, in the said Thomas Ball tract of land, it is not advised, but it denies that said interest so owned by the said Mary Bales was an undivided interest. It is informed, and it believes truly so, that partition of said Thomas Ball land had been made by and between his children, whether deeds had ever been made between them, it is not advised, but each one of them had taken possession as Respondent is informed of his and her respective share, *and held them as his and his own and adversely to the other*, and it is further advised that the share of the said Mary Bales was the eastern part of said tract of land and through this land she conveyed to Respondent the right of way as aforesaid, which conveyance was well known to said Complainants and their vendor M.S. Ball.

Respondent supposes it to be true that M.S. Ball and wife have granted to the female complainant a portion of said Thomas Ball farm, *and the whole or a part of Tract No 2.* but of this it has no knowledge and neither admits nor denies the same.

Respondent will now show your Honor that it is true that in the deed made by M.S. Ball for a strip of land for right of way purposes through the Thomas Ball farm, that he reserved the right to use cultivate and enjoy said strip of land on each side of said road as nearly up to the same as could be safely done, but respondent denies that by reason of this reservation and by reason of the grant by the said M.S. Ball to the said Martha E. Kincaid of a part of said land, that she

becomes entitled to the benefit of said reserved rights or any of them. Said reservation was personal to the said M.S. Ball and could not be passed by him to another.

Respondent will now show your honor that it permitted said M.S. Ball while he owned said land to cultivate said strips of land up somewhat towards the ends of the ties and this privilege it allowed him to enjoy until it became necessary for this respondent to erect fences on each side of its road-bed. When it did this, it placed said fences on the outer edges of the strip of land granted to it for railroad purposes as it had a right to do. It is true that after said road was constructed that said M.S. Ball, the then owner of said land, built fences on said strip of land and parallel to the track and within less than fifty feet of the center thereof, but this was merely permissive upon the part of your respondent and conferred upon said Ball no right to maintain said fences as so built by him, but said fences were of no benefit to this respondent and were no protection to it and in no way or part a compliance by this respondent with the laws of Virginia which require it to make a fence on each side of its road-bed in accordance with the provision of section 2038 of the Code of Virginia. It is true as alleged in said bill that your respondent has built a fence on each side of its railroad at the edge of said right of way, whether it runs entirely through the lands of the said Martha E. Kincaid as conveyed to her by her father, the said M.S. Ball, or by her mother the said Nanie A. B. Ball, respondent does not know, as it does not know the lines of the tract so conveyed to her. Respondent does not know whether or not these fences so erected by it make it impossible to satisfactorily ^{cultivate} said strip of land. It would presume, however, that it would not be altogether safe to have teams on said little narrow strip between respondent's wire fence and the rail fence erected by the said M.S. Ball.

Respondent denies that it is an advantage to said railroad company to have said land cultivated up to the railroad bed. It denies that cultivation thereof prevents the accumulation of dry grass, weeds, briars and other inflammable matter, but on the contrary, such cultivation is a fruitful source of inflammable matter and its accumulation on said right of way. Respondent says that the very reason why it took

and why the laws of Virginia permit ~~the~~ railroad companies to take 100 feet of land for right of way purposes, ^{and is} was ^{to} enable it, and such other companies, to keep their tracks clear of debris and inflammable matter and other obstructions dangerous alike to the traveling public and the adjacent property owners. Respondent says that it has no more right of way than is necessary for its purposes and the careful and secure maintenance of its track. Respondent denies that complainant has any right to partition of said tract of land; it denies that it acquired ~~either~~ from M.S. Ball or from Mary Bales a right of way to ^{or through} an undivided tract of land, but it asserts that it acquired a right of way from M.S. Ball the former owner of said land of the western end of said Thomas Ball tract, ^{and through Tract No 2.} and from Mary Bales of the eastern end thereof: that in each of said deeds, the strip of land conveyed is accurately defined by metes and bounds; ^{and it asserts} that ~~it~~ took possession of the same at the date of said deeds, which was the 30th and 31st days of August, 1889; that it has held the open, notorious, continuous and exclusive possession thereof ever since under a claim of right, and that if said complainant, or their vendors, ever had any right to partition that the same is now barred by the statute of limitations which respondent invokes for its protection against such hatched up claims.

Respondent now having answered said bill as fully as it is advised it is necessary to answer the same and here denying every allegation in said bill not hereinbefore admitted or denied, it prays to be hence dismissed with its costs.

B. T. Humeau
Attorney for Respondent.

Louisville & Nashville
Railroad Co.

L. + N. R. R. Co.

ads. { Answer-

Martha C. Kincaid ad.

CIRCUIT COURT OF LEE COUNTY.

IN VACATION.

MARTHA E. KINKAID AND B. F. KINKAID)

vs)

) Decree.

LOUISVILLE & NASHVILLE RAILROAD COMPANY)

Pursuant to an order entered herein at ^athe former term of this Court submitting this cause to the Judge of this Court for decision in vacation, this cause came on to be heard on this 3rd day of August, 1901, upon the bill of complaint and the demurrer thereto in writing filed by the Defendant Company, and was argued by counsel; ~~on~~ ^{on} consideration whereof the Court is of opinion that B. F. Kinkaid is not a proper party plaintiff in this cause, and it is therefore adjudged, ordered and decreed that the name of the said B. F. Kinkaid be, and the same is, hereby stricken from the said bill as one of the Plaintiffs therein; and the Court being of opinion that if the facts stated in the bill are true the said Martha E. Kinkaid has a cause of action against the said Defendant Company and is entitled to the relief prayed for in the said bill, it is therefore adjudged, ordered and decreed that the demurrer of the said Defendant Company as to all grounds other than the joining of the said B. F. Kinkaid as complainant herein be, and the same is, hereby overruled, and the Defendant Company is given until the first Rule in September next to file its answer herein, if it should desire so to do.

To said Clerk
of said court.

H. A. W. Siler, Judge
of Lee County Circuit
Court.

Martha C. Kincaid et al

vs } Decree

S. & N. R.R. Co.

Entered on Chancery
Order Book No. 6-
Page 597. August
the 5th 1901.

The depositions of T.S.Snavely and others taken pursuant to agreement at the office of C.T.Duncan in the town of Jonesville, on the 19th day of October, 1901, before me, Geo.P.Cridlin, a notary public in and for the County of Lee and State of Virginia, which depositions are intended to be read as evidence ^{in behalf of the plaintiffs} in ~~the~~ suits in chancery now pending in the Circuit Court of Lee County in which Martha E.Kincaid ~~are~~ ^{N.A.R. Ball and} plaintiffs and the Louisville & Nashville Railroad Company is defendant.

Present: B.H.Sewell of counsel for the plaintiff; and C.T.Duncan counsel for the defendant.

T.S.Snavely a witness of lawful age being duly sworn deposes as follows:

Q.1.-- State your age, occupation and place of residence.

A.--I am 50 years old, I am a farmer and school teacher, and live at Ewing, Lee County, Va.

Q.2.-- Are you acquainted with the plaintiffs in this cause, Mrs. N.A.R.Ball and Mrs. Martha E.Kincaid?

A.-- I am.

Q.3.-- Are you acquainted with the lands of Mrs. N.A.R.Ball and of Mrs Martha E.Kincaid, through which the right-of-way of the L & N. R. Co. runs in Lee County Virginia beginning at the west line of the W.W. Bales land on the east and running to your lands on the west, and if you are state which part owned by Mrs. Ball and which part is owned by Mrs. Kincaid?

Obj.-- The foregoing question in so far as it undertakes to prove the ownership of each of these parties to said land is objected to because the deeds under which said parties named hold said land, are the best evidences of the ownership and boundaries thereof.

C.T.Duncan for deft.

A.-- I am acquainted with the lands of Mrs. N.A.R.Ball and Mrs. Martha E.Kincaid mentioned above. My understanding is that Mrs. Ball owns from the White Bales farm down to what we know as the Gray farm; and That Mrs. Kincaid owns the rest of it down to my line.

Obj.-- So much of the foregoing answer as gives the understanding of the witness and not his knowledge is objected to.

C.T.Duncan for deft.

Q.4.-- Please state the what kind of track the Louisville & Nashville Railroad Company has made through these lands as you understand are claimed by Mrs. Ball and Mrs. Kincaid, that this state whether or not there is one straight track or whether there are any side tracks or switches?

A.-- There is just one single track.

Q.5.-- State whether or not along this track there are any cuts or fills?

A.-- There are.

Q.6.-- Do you know how many cuts and fills there are, and if so state the number and whether or not they are large or small ones?

A.-- There are ^{five} ~~four~~ cuts and ~~two~~ fills, I believe, if there are any others I don't remember them. There is one considerable cut, the others are small ones. The fills are small as compared with others on the railroad.

Q.7.-- State where these cuts and fills are located, whether on the Kincaid land or on the Ball part?

A.-- There are three cuts and two fills on the Ball part, and two cuts on the Kincaid part.

Q.8.-- Are you acquainted with or know the extent or width of the right-of-way through the Ball land and the Kincaid land, or in other words, do you know the outside limits of it?

A.-- I know it where the track has been enclosed by fences on each side, the other I do not know except as I judge it with my eye, which I presume is practically correct.

Q.9.-- After the construction of this railroad through these lands and since said Company has been operating and running trains thereon, state whether or not, at any time has the right of way been cultivated or used by M.S. Ball or those claiming under him, and if so to what extent has said right of way been so cultivated used and enjoyed?

A.-- ~~It has been used~~ They have been using said land, grazing it, and cultivating it, more in some places than at others. In some places they have cultivated it up to within fifteen feet of the road and at others further away.

Q.10.-- State whether or not this cultivation, use and enjoyment of said right of way by the owners of the said land has been done with safety both to them and their employees and hands and the safety to said Company in operating its train?

A.-- It has as far as my knowledge goes.

Q.11.-- State whether or not the owners of said land constructed fences on said right of way at any place and if so how far said fences were constructed and whether or not said fences were built upon the ^{right of way} through the Ball land or the ~~the~~ Kincaid land?

A.-- They did construct fences through all the land at places, it was not the entire length. I think about two-thirds of these fences were on what I understand to be the Ball and the residue on the Kincaid land. At places the fences were on both sides of the road, none of them were continuous all the way through. Sometimes they would just be along the side of a field, and at other places more, arranged to suit the purposes of the farmer.

Q.12.-- How far were these fences built from the road bed?

A.-- I never measured the distance, but from just passing along and looking at it, through some of the lands, I don't think the fence was further from the track than fifteen or sixteen feet, at other places it was further away, perhaps about twenty feet.

Q.13.-- While these fences were thus built along on said right of way did the Balls and Kincaids cultivate or have this right of way cultivated along there, or not with safety?

A. -- They did.

Q.14.-- State whether or not the Louisville & Nashville Railroad Company built or had built any fences on said right of way through said land, and if so, at what points on said right of way have said fences been built and how far along said right of way have said fences been built through said land?

A.-- Commencing at what we, in the Country there know to be the Mary B Pales line, and on the south side of the rail road, there is a fence that runs to the east line of Gary land which I understand to be the east line of the Kincaid land. This is all the fence that the railroad company has erected on the lands of N.A.B. Ball, and this string of fence is about half a mile long.

On the Kincaid land the fence begins at the Ball line and extends on both sides of the railroad to the main cross road to what is known as the Wynn crossing.

Q.15.-- When were these fences constructed by said railroad Company and when were the fences built by the said Ball and Kincaid.

A.-- I don't remember just when the railroad built ^{its} ~~their~~ fence, not more than three years ago I think. The other fences were constructed soon after the construction of the railroad.

Q.16.-- State whether or not the space on said right of way between said two fences could have been cultivated, used and enjoyed with safety?

A.-- It could not.

Obj.-- The foregoing question and answer is objected to because a mere opinion of the witness.

C.T.Duncan for deft.

Q.17.-- State whether or not said fences built on said right of way by said railroad Company prevent Mrs. Ball and Mrs. Kincaid from the cultivation, use and enjoyment of said right of way?

Obj.-- The foregoing question and any answer thereto is objected to because a mere opinion of the witness, he not having shwon that he has tried it or seen it tried.

C.T.Duncan for deft.

A.-- It does.

Q.18.--By being thus prevented from the use and enjoyment of said right of way, are said parties damaged thereby?

A.-- They are.

Obj.-- The foregoing question and answer are objected to for the same reasons stated above.

C.T.Duncan, for deft.

Q19.- State whether or not the cultivation and use of said right of way prevents the accumulation of inflammable material on said right of way?

Obj.-- The foregoing question and any answer thereto are objected to because they question asks ~~ask~~ for a mere opinion of the witness and the answer thereto can be nothing but an opinion.

C.T.Duncan. for deft.

A.-- It does prevent it.

Q 20.-- Give your reasons for saying that cultivation and use of said right of way prevents the accumulation of inflammable material thereon?

A.-- When we cultivate the land up close to the track we take every thing off that can be taken off, but when it is in side of the right of way they just cut the stuff down and let it lie there, or let it grow up on broom sage and stand there so that it catches on fire occasionally when a ~~everytime~~ train comes along.

Cross Examination.

X.Q.1.-- You state in answer to question 19 that the cultivation and use of said right of way prevents the accumulation of inflammable material on said right of way, does not this depend entirely or to a great extent upon what it is cultivated in and how it is used?

A.-- Some crops of course would leave more litter on the land than others.

X.Q.2.-- Then you would state that this would depend upon how said land was used and cultivated would you not?

A.-- Yes, it would.

X.Q.3.-- If the ~~landowner~~ land-user or cultivator allowed it to grow up in grass or filth and fall down upon it the same danger from fire would result as if the railroad company allowed it to get in that condition would it not?

A.-- It would.

X.Q.4.-- State how the land is on the north side of the right of way through what you have described as the Kincaid land, and after you have done that state how the land lies on the south side of said railroad through the Kincaid land so far as embraced in the right of way?

A.-- The land lies practically level through this tract. there are two cuts, or rather one cut divided by a crossing on this land, which is 8 or 10 feet deep at the deepest point and running out shallower each way.

X.Q.5.-- You state that at some points the land could be cultivated up nearer to the track than at other places. Would not a fence built so as to leave outside of the enclosure of the track all the little parcels that could be thus cultivated, be very crooked and zig-zag?

A.--It would necessarily have to be crooked more or less.

X.Q.6.-- ~~####~~ Are you an expert in railroad building and operation, or have you had any practical experience in the operation of railroads

A.-- I am not an expert and have had no practical experience in the operation of railroads.

X.Q.7.-- There are places on said land where practically the entire right of way is occupied, ~~are there not?~~ by cuts and fills, are there not?

A.-- At one place the largest cut takes up about 45 feet on one side of the track and about 33 feet on the other side. The fills do not occupy the whole space at any place that I remember.

X.Q.8.-- Where the track is fenced on the south side through the Ball tract as above described by you, is any land enclosed that could be safely cultivated, or usefully cultivated, and if so how much?

A.-- There are strips of land along there that could be so cultivated if the railroad fence was away.

X.Q.7.-- Does not Indian Creek run pretty close to the right of way most of the way along that ~~xxx~~ fence?

A.-- Said creek runs nearly half the distance close along to the right of way and sometimes on it.

X.Q.8.-- About how much land on the Ball tract is embraced in the right of way that could be safely cultivated if no fences were there?

A.-- I should think from four to six acres.

X.Q.9.-- How much on the Kincaid piece?

A.-- I should think from two to four acres.

Re Examination.

R.E.Q 1. Up to what distance from the center of the road bed could said right of way be safely cultivated and used through said lands on both sides of said road bed through the entire lands, giving the distances on the Kincaid part and on the Ball part?

A.-- In the right of way where there is no fills and cuts, could cultivate and use said right of way within fifteen feet from the center line ~~xxxxxxxxxxxx~~ of the road bed on both sides thereof with safety. In the deepest cut you couldn't cultivate nearer than within 45 feet of the center line of the railroad on the north side and on the south

side about 33 feet from said center line. In the more shallow cuts you could cultivate within 25 feet of the road and at the fills you could cultivate up very close to them within 20 or 25 feet I suppose

Re Cross Examination

Q.-- State how close the cultivation of said right of way up to within fifteen feet of the center line would you be cultivating to the end of the ties.

A.-- About 11 feet.

Q.2.-- How close would that take you to the outer edge of the ditch on the most level land on either of those tracts.

A.-- In places it would take you into the ditch and on the brink of the ditch.

Q.-- Do you think it would be safe to be plowing a horse or team of horses within 15 feet of the center line of the track when trains were moving on that track?

A.-- It would about as safe as where we do plow - we have to unhitch and hold them.

Q.-- You state then to the Court that it would be as safe to be plowing with a team within 15 feet of the center of the track with a train moving on that track as if you were plowing 50 feet from it, do you?

A.-- I don't state that, the farther away from the track one can get the safer it is. We always have to avoid the running trains, by stopping or getting out of the way.

X.Q. How much of the entire length of the right of way through these two tracks of land could be cultivated within 15 feet of the center line of the track without interfering with the ditches or the slopes of the cuts?

A.-- I don't know.

Q. Now you state that the deepest ~~fill~~ cut the edge of it is 45 feet from the center line on one side, and you also say that at this point the right of way could be cultivated up to within 45 feet of that center line, wouldn't that be cultivating right on the edge of that cut?

A.-- The 45 feet would run right to the edge of the cut and this would cause dirt to roll down in the ditch.

wit: 2 day 11.00
28 mil. 1.12
2.12

J. S. Snively

Virginia, Lee County, to-wit:

I, Geo. P. Cridlin, a notary public in and for the County of Lee in the State of Virginia, do certify that the foregoing deposition of T.S. Snavely was taken, sworn to and subscribed, before me at the time place and for the purpose in the caption mentioned.

Given under my hand this the 19th day of October, 1901.

Geo. P. Cridlin N.P.

Murtha E. Kincaid

v.

L. & W. R. R. Co.

^{vs}
W. A. R. Ball et al

^{vs}
L. & W. R. R. Co.

Deposition of
J. S. Suwely #2.12

1901. Received from Geo. P.
Gridlin the N. P. before
which taken & filed Oct
24th 1901.

A. B. Munsey Clerk

Geo. P. Gridlin N. P.
for taking these depositions
Paid by R. R. Kincaid 11.50

The depositions of J.M.Wheeler, W.E.Wynn, ~~B.F.Kincaid~~,
_____, taken before me, H.C.Joslyn a justice of
the Peace for Lee County Va, Pursuant to agreement of parties by Counsel
to be read as evidence in behalf of the Plaintiffs in ^{two} certain suits
in Chancery pending in the Circuit Court of Lee County, wherein N.A.
R.Ball and Martha E.Kincaid are Plaintiffs and the Louisville and
Nashville Railroad Company are defendants, this the 28th'day of Oct,
1901.

Present: B.H.Sewell of Counsel for the Plaintiff,
C.T.Duncan Attorney for the defendant.

J.M.Wheeler after being duly sworn deposeth and says:

Ques.1. State your age residence and occupation?

Ans. I am 38 years of age, I reside near Caylor Lee county Va. I am a fa
farmer and merchant.

Ques. 2. Are you acquainted with the Plaintiffs in these causes?

Ans. I am.

Ques.3. Are you acquainted with the lands claimed by the Plaintiffs in
these causes through which the right of way of the Louisvilla and Nash
ville Railroad Co. runs in this county, beginning at the west line of
the W.W.Bales land on the east and running to the lands of T.S.Snively
on the west, and if you are state what part is claimed by Mrs. Ball and
what part is claimed by Mrs. Kincaid?

The foregoing question and any answer thereto is objected to because
it assumes that all the land from the Bales line to the Snively line is
owned by the Plaintiffs, when in fact it is show by the exhibits that
there is another tract, to wit, the Mary J.Bales land lies between.

C.T.Duncan for Deft.

Ans. I am acquainted with the lands, and I understand Mrs. Ball owns
from the W.W.Bales land to the east line of the Gray land, and the trat
known as the Gray land belongs to Mrs. Kincaid, that is I understand Mrs
Kincaid claims from the east line of the Gray land to the ~~East~~ east line of
the Snively land.

Ques.4. How long have you been acquainted with said lands?

Ans. About 25 years I think-

Ques.5. Since the defendant Co. has been operating and running ~~Trains~~
on said Right of way, state whether or not you have observed the running

and opperating of said trains thereon?

Ans. I have.

Ques. 6. State whether or not there are any cuts or fills on said right of way, and if there are, state which lands they are on the Ball, or Kincaid parts?

Ans. There are cuts and fills, there is one ^{cut and one fill} on the land claimed by Mrs. Kincaid and four, ^{cuts and two fills} I think, on the land claimed by Mrs. Ball. ~~Ball~~

Ques. 7. Do you know the width of the right of way through these lands, and if so state what it is?

Objected to because the deeds for right of way filed by the Plaintiffs are the best evidence of the width thereof.

C.T. Duncan for Deft.

Ans. I do, it is one hundred feet, as I suppose.

Ques. 8. After the construction of said railroad, on said right of way through said lands, and since said company has been opperating and running trains thereon, state whether or not M.S. Ball or those claiming under him have been cultivating or using any portion of said right of way, and if so to what extent has said right of way been so used cultivated and enjoyed?

Ans. Since said road has been constructed and in opperation M.S. Ball and parties claiming under him have been using parts of the strip of land granted for right of way, at some places closer and at other further from the road bed, at some places perhaps they have cultivated to within fifteen feet, at other places to within 20 feet, at others perhaps 30 feet and at others perhaps with in 35 feet or more

Ques. 9. State whether or not this cultivation, use and enjoyment of said right of way, by said parties was done with safety both to themselves and with safety to said company in opperating its trains.

The foregoing question and any answer thereto is objected to because it asks the witness for an opinion and the witness is not shown to be an expert either in the construction or opperation of a railroad.

C.T. Duncan for Deft.

Ans. It was.

Ques. 10. State whether or not M.S. Ball and those claiming under him ever constructed fences on said right of way and if so where said fences

were built and how far along said right of way said fences were built, and state whether or not said fences were on the right of way on the Ball land or on the Kincaid land?

Ans. There were some fences constructed on the Ball part, I would say about half way ~~or two thirds of the~~ way along it, I cant be positive about it, but I think these fences were only on the north side of the road. There were also some fences on the Kincaid part, and as I remember these fences were on both sides of the road and run from what is called the Wynn crossing to the Ball line, being about one fourth of a mile in length, there were also fences on this Kincaid piece from the Wynn crossing to the Snavelly line, these fences were on ~~each~~ the north side of the railroad.

Ques. 11. How far were these fences built from the center line of said railroad?

Ans. They were built from 15, to 40 feet from the center of the railroad, according to the construction of the road and the shape of the land.

Ques. 12. While these fences were thus built along said right of way, state whether or not the said Ball and Kincaid or those claiming under them, cultivated or used said right of way with safety up to said fence

This question and any answer to it is objected to, because it asks for an opinion of the witness, and because immaterial.

C.T. Duncan for deft.

Ans. They did.

Ques. 13. How long did these fences remain on said right of way, and how long did the said parties cultivate and use that portion of said right of way?

Ans. I suppose said fences were there six or seven years and said parties used that part of said right of way out side of said fences, all that time.

Ques. 14. State whether or not the defendant Co. built or had built any fences on said right of way through said lands, and if so, at what point on said right of way, have said fences been built, and give the length of said fences if you can.

Ans. There are fences built on both of said parcels of land, I do not know the length of the fence on either the Ball or Kincaid tracts

These fences are built, as I understand, on the outer edge of said right of way strips. And some are built parallel to where Ball had previously erected fences.

So much of the foregoing answer as gives the witnesses understanding is objected to as evidence.

C.T. Duncan for Deft.

Ques. 15. When did said Co, build said fences?

Ans. I do not know, some of it was built perhaps a year ago and some perhaps two years ago.

Ques. 15. State whether or not the space on said right of way between the fences built by Ball and Kincaid and the said company could have been cultivated used and enjoyed with safety.

The foregoing ~~ANSWER~~ Question and any answer thereto is objected to be cause, this witness has not testified, and there is no evidence in the case to show that any fences have been erected by the railroad Co. at points where fences had been built by said Ball or those claiming under him, and because the question of safety is one of opinion and is not admissible as the witness is not shown to be an expert. And because the answer is immaterial.

Duncan for Deft

~~Ques. 15. State whether or not the space on said right of way between the fences built by Ball and Kincaid and the said company could have been cultivated used and enjoyed with safety.~~

Ans. They could not

Ques. 17. State whether or not the fences built by said Co. prevent Mrs Ball and Mrs. Kincaid from the cultivation use and enjoyment of said right of way?

This question and the answer thereto is objected to because it asks for an opinion of the witness and because it is immaterial and irrelevant.

Duncan for Deft.

Ans. They do.

Ques. 18. By being thus prevented from the use of said right of way are said parties damaged thereby .

Objected to for the same reason stated last above.

Duncan for Deft.

Ans. They are damaged the amount of the land they could have cultivated I do not know how much this would be, I do not know how much there is of it.

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Ques. 19. State whether or not the cultivation and use of said right of way prevents the accumulation of inflammable material thereon?

Objected to because immaterial and because it asks the witness for an opinion, and not for a fact.

Duncan for Deft.

Ans. It does.

Ques. 20. Have you observed this fact from the cultivation and use of said right of way?

This question is objected to because leading

Duncan for Deft

Ans. Yes sir I have, I know it from using my own.

Ques. 20 repeated. State whether or not, you know that the cultivation and use of said right of way prevents the accumulation of inflammable material thereon, by experience in cultivating the right of way through your land.

Objected to because leading and because the witness land has nothing to do with this enquiry and because he has not shown how his land is cultivated.

Ans. I do.

Ques. 21. Up to what distance from the center line of the road bed could said entire right of way be safely cultivated and used through said lands on both sides of said road bed, giving the distances both on the Ball and Kincaid lands?

Objected to because it asks the witness for an opinion that he has already shown himself incompetent to answer not having made any measurements.

Duncan for Defts.

Ans. I think on the Kincaid part it may be cultivated to within 25 feet on each side, it might be that it could be cultivated closer and it might be not so close. On the Ball land it would run from 15 feet to 45 feet. Where there is no cut or fill it might I think be cultivated to within 15 feet on cut and fills it ~~would~~ could not be cultivated so close. There only one cut that I recollect where it runs out as much as 45 feet.

Gross-examined

Ques. 1. Have you made any measurements of the width of cuts or fills at any point along said right of way either on the Ball or Kincaid land

Ans. I have not.

Ques. 2. You say that the cultivation and use of land ~~along~~ the right of way prevents the accumulation of inflammable matter on the right of way, does this not depend on how it is cultivated, and what is allowed to accumulate upon it?

Ans. It does. If the land is grazed or cultivated in corn inflammable matter will not accumulate, but if cultivated in small grain it will accumulate to some extent.

Ques. 3. Suppose it is allowed to grow up on grass and the grass fall down and die on it what then would be its state as to inflammable matter

Ans. If it was allowed to grow up as stated in the question then it would be covered with inflammable matter, but we don't allow it to grow up and fall down. That is I do not mine.

Ques. 4. You say that the strips of land inside of said railroad fences cannot be safely cultivated, now is not ~~your land fenced~~ the right of way through your land fenced and have you not since said fences were erected been cultivating the same safely.

Ans. The right of way through my land is fenced and I have been cultivating inside of said fences, but I did not regard it safe, and agents of the co. have been fussing at me for doing it. I merely took the chances

Ques. 5. If you thought it much risky or dangerous, why did you take the risk?

Ans. Because I thought I had the right to cultivate.

Ques. 6. Then you just took the risk merely to assert your right did you

Ans. Yes Sir:

Ques. 7. Then it was not for any benefit you thought the cultivation of that little strip would be?

Ans I cultivated it because I thought it would be of some benefit and because I thought I had the right to use it.

Ques. 8. From the crossing called Wynn's crossing to the Ball line was there any fence built by Ball ~~after~~ the road was built or was the fence there when the road was built?

Ans. My best recollection is that Ball built it after the road was built but as to this I am not positive.

Ques. 9 What became of Ball's fences after the Co built its fences along

the same parts of the railroad.

Ans. I do not know, I think some of it is there still and some of I think was removed by Ball

Qnd. What kind of use has Ball and those claiming under him, put the land of the right of way to, where they have used it all.

Ans. They have used it for general farming purposes, grazing, corn wheat and oats.

Ques. Have they cultivated at any time, either in corn, wheat or oats any part of said land up to within 15 feet of said center line of the railroad at any point either on the Ball or Koncaid lands, if so at what point on said land, and how long was the piece thus cultivated.

Ans. They cultivated it up to the fence just east of the Wynn crossing it did not look to me to be more than 15 feet from the center though I never measured it.

Ques. Does not Indian creek run quite close to the railroad for quite a distance along the Ball land?

Ans. Yes at one point it runs pretty close the railroad, I do not know the distance it thus runs.

Ques. At this point is the Co's fence between the creek and railroad and could the land along there on the right of way be safely cultivated

Ans. The fence is between the creek and road bed and I do not know whether this part of the right of way could be safely cultivated or not.

And further this deponent saith not

Witness Claims

2 days \$1.00

64 miles 256

J M Wheeler

W.E.Wynn another witness after being duly sworn, deposes as follows:-

Ques.1. State your age residence and occupation.

Ans. Age,51,residence,Jonesville,occupation Farmer and Deputy Treasurer of Lee County.

Ques.2. Are you acquainted with the plaintiffs in this cause,and also the right of way of the Louisville and Nashville Rail Road Co., that runs through the lands claimed by them mentioned these causes situated in the county beginning at the west line of the W.W.Bales land on the east and running to the lands of T.S.SNanvely on the West,and if you are state what part is claimed by Mrs.Ball and what is claimed by Mrs. Kincaid.

Ans. I am acquainted with Mrs. Ball and Mrs. Kicaid,and am acquainted with the right of way of the said rail road company as mentioned aforesaid;Mrs.Ball claims to the line of the land that I sold ~~xxx~~ ~~xxxxxxxxxxxx~~ B.F.Kincaid, and which is now owned by Mrs.Kincaid. The land owned by Mrs.Kincaid is that which I formerly owned and which I sold as aforesaid,and joins the lands of T.S.Snaveley on the west.

Ques.3. How long have you been acquainted with the said right of way and said land through which it runs?

Ans.I have been acquainted with the said right of way ever since its construction,and have known the land longer,perhaps more than 20 years.

Ques.4. State whether or not you ever lived near said lands and right of way? If so how near to them and how long did you live there?

Ans. I lived on the land now owned by Mrs. Kincaid and through which the right of way now runs nearly ten years.and within 300 yards of the said right of way.

Ques. 5. State whether or not you lived at said place at the time the defendant company began to operate and run its trains on said right of way,and if so,how long did you live there since it began to operate trains thereon?

Ans. I lived there when the said company began to operate its trains,and lived there untill January,1899.

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Ques.6.While you lived at said place State whether or not you observe said company operating and running its trains on said right of way?

Ans. I did.

Ques.7.State whether or not there are any cuts or fills on said right of way; and if there are state the number and where they are located? whether on the Ball or Kincaid part?

Ans. There are about four cuts on the Ball land, and I think there are two fills that amounts to much, there is a small fill, over a culvert there across a branch. There is one cut on the Kincaid land that is divided by the road passing through it; there is one fill and part of another, the part of a fill is on the line between this land and Mr. Snavely's land.

Ques.8:After the construction of the said Rail Road on said right of way through said land and since said company has been operating and running its trains thereon, state whether or not M.S. Ball or those claiming under him ever cultivated or used any portion of said right of way, and if so to what extent?

Ans. Mr. Ball and others have used part of said right of way, and cultivated all the land that was not occupied by the bed of the road that was fit to cultivate on both sides of said road bed and on both of these tracts of lands.

Ques.9. State to within what distance from the centre line of the road bed did said parties cultivate said portions of said right of way?

Ans. In some portions of said right of way the land was cultivated to within 18 or 20 feet of the ends of the ~~xxx~~ ties, but in other places where there were fills and cuts, not so close. Through one of the fields that I cultivated I had the fence set within I think 10 feet of the ends of the ties, though I never measured it, this field was east of the crossing, designated in some of the testimony as the Wynn crossing. This field is on the Kincaid land, and the fence spoken of is on the north side of the rail road. On the land that I ~~considered~~ ^{owned} on the west of the crossing, which land is now owned by Mrs. Kincaid, and north of the rail road I had another fence *along the edge of the cut from 18 to 20 feet from end of ties.*

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Ques. 10. State to within what distance from the centre line of the road bed on both sides thereof, did said parties cultivate said portions of said right of way without reference to any fences thereon?

Ans. Through the levellest of said land its was cultivated ~~xxxx~~ to within from 15 to 20 feet of the centre of the said road on both sides of said road bed, and along the cuts it was culitivaed up to the brink of the cuts as close up as it could be plowed to, along the fills it was cultivated up as close as you could get to them, up to the edge of them you know, a d this applied to both the Kincaid and Ball tracts.

Ques. 11. State whether or not this cultivation use and enjoyment of said right of way by said parties was done with safety both to themselves and with safety to said co pany in operating its trains.

The foregoing question and any answer thereto is objected to because it asks the witness for a mere opinion, specially in so far as future operations of the road is concerned.

C.T. Duncan, Atty for Deft.

Ans. It was.

Ques. 12. State whether or not M.S. Ball and those claiming under him ever constructed fences on said right of way and if so when were said fences built, where buit and how far along said right of way said fences were built, and staing whether said fences were on the Ball or Kincaid land?

Ans. There were fences built along said road on both the Kincaid and Ball land. M.S. Ball put a portion of the fences there and had other portions of the fences put there. A portion of said fences were built before any trais ever run on said road, as well as I remember the remainder of the fence were put up within a year or so of the construction of the road. The fences were built all on the north side of the road with the exception of one fence. From the Wynn Corssing to a private corssing near Balls store the fence was built just as close as they could get it to the bring of the cut and the fills with the exception of a few places around culverts

(111)

and fills they built the fences streight as conveyntly. With the excetion of one or two cuts the fence was put within about 15 or 20 feet of the centre of the said road bed, this is only my estimate I never measured it. A portion of the fences on the Kincaid land was uilt by me west of the road crossing adjoining the land of Mr. Snavelly and also on the south said of the road on the esatst side of the crossing, I meant that I put the fence there on that portion of the land, this is all the fences that I remember being on the right of way. A portion of this ~~xxxx~~ fence on the south side was from 40 to fifty feet from the centre and a portion was about 15 feet. This fence run from the crossing to the Ball line.

Ques. 13. While these fences were thus built on said right of way state whether or not the said Ball and Kincaid or those claiming under them cultivated or used said right way with safety up to said fences.

Objected to because the answer of the witness is the mere opinion and is not shown to be an expert either in rail road building or operation.

C.T. Duncan, atty for defendant.

Ans. They did.

Ques. How long did these fences remain on said right of way, and how long did said parties cultivate and use that portion of said right of way?

Ans. Most of the fences still remain there yet, ~~xxxxxxx~~ and the parties cultivated it on up as long as the fences remained.

Ques. State whether or not the defendant company built or had built any fences on said right of way through said land, and if so at what point on said right of way have said fences been built, and give the length of said fences if you can, designating as near as you can the point where they begin and stop.

Ans. said company have constructed fences on both sides of its track, beginning at the Wynn crossing on the north side of the road, running east to the Ball land, a distance of about one fourth mile, also beginning at the Wynn crossing on the south of the road and running east to or near the Ball grave yard, a distance of from one half to three quarters of a mile, or possibly furthur.

These fences are about fifty feet from the centre of the road accordin

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to their measurement.

Ques.15. State whether or not the fences built by said company are or were parallel with the fences that were built by the said Ball or those claiming under him?

Ans. They run practically parallel with the said fences.

Ques. 16. State whether or not the space on said right of way between the fences built by Ball and Kincaid and the fences built by said company could have been cultivated used and enjoyed with safety?

Objected to because the question seeks a mere opinion of the witness without any facts to base it upon, and is therefore inadmissible, and further because the answer whatever it is is immaterial.

C.T.Duncan Atty for the defendant.

Ans. They could have been. I did not understand you to mean with ~~the~~ the fences there. With the two fences there it could not be cultivated with safety.

Ques.18. State if you can when the said company built said fences?

Ans. I do not know that I could give you the exact time, but if I remember right they have been constructed within the last three years.

Ques.19. State whether or not the fences built by said company prevent Mrs. Ball and Mrs. Kincaid from the cultivation use and enjoyment of said right of way.

The foregoing question and any answer thereto is objected to because the question is a mere opinion of the witness, and because it is immaterial. C.T.Duncan, Atty for the Deft.

Ans. They do.

Ques.20. By being thus prevented from the use of the said right of way are said parties damaged thereby?

Objected to because the question asks for an opinion, secondly because it is leading. C.T.Duncan, atty for Deft.

Ans. They are because there is some very valuable land enclosed by said fence.

Ques. State whether or not the cultivation and use of the said right of way prevent the accumulation of inflammable material thereon?

Obected to because the answer would be an opinion of the witness.

C.T.Duncan, Atty for Deft.

Ans. It does.

Ques.22. State whether or not you have observed this fact from the cultivation and use of said right of way?

Objected to because immaterial.

C.T.Duncan, atty for deft.

Ans. I have. I have cultivated the land myself.

Ques.23. You state in answer to question 15 that the space between the railroad fence and the fence built by Ball and Kincaid could not have been cultivated with safety, please give your reasons for saying that this space could not be cultivated with safety.

Ans. Simply because a man could not cultivate the land without a team well, and that fence being there it necessarily holds him there while the trains are passing.

Ques.24. Up to what distance from the centre line of the road bed could said entire right of way be safely cultivated and used through said land on both sides of said real road bed giving the distances both on the Ball and Kincaid land.

The foregoing question and the answer thereto are both objected to because the same identical question has been heretofore asked the witness and he has given the answer thereto.

C.T.Duncan Atty for the Deft.

Ans.

Beginning at the Snavelly line on the south side of the rail road through what is known as the Kincaid land it can be cultivated within 20 feet of the road to the Ball line, and on the Ball land on the same side within about the same distance until you get to the first cut, which is possibly from 20 to 25 feet from the centre of the tract to the top of the cut, from said cut to the creek from 20 to 25 feet, then if I remember right the creek comes in there, but I do not remember whether there is any space in there or not for a short distance, then from where said creek leaves the road there is bottom varying from 20 to 60 or 70 feet wide between said rail road and the creek, that can be cultivated within from 15 to 20 feet from the centre of the road, from this place up to the store

it could be cultivated to within about the same distance, from the store on up to the Bales line I think that could be cultivated within 15 feet of the road, it is perfectly level. Starting at the Snaveley line on the north side of the rail road, I think from the Snaveley line to the Wynn crossing it can be cultivated within 25 feet of the centre of the road, and from the said crossing going east to the Balls crossing east of the first culvert it can be cultivated from 15 to 18 feet, and from this point on to the east side of the big cut from 20 to 40 feet, varrying, from the big cut to or near the grave yard, from 15 to 25 feet, and from said point on east to toward the culvery along the cut, I suppose that would be 25 feet, and from said cut to the cut west of the Ball crossing at the store from 15 to 20 feet, with the excetion of right at the culvert, and from said cut the road crossing, at Balls store, from 20 to 25 feet and from said crossing to the Bales line about 15 to 18 feet.

Ques. 25. While you were cultivating the right of way as stated by you did the said company make any objections to your doing so?

Ans. Objected to because immaterial,

C.T. Duncan, Atty for the deft.

Ans. they did not. they never did to me.

Cross Examination

Ques. When did you last examine said lands and said right of way and said railroad and said fences with a view of refreshing your mind so as to testify in these causes?

Ans. I never did examine it with a view of testifying in my life.

Ques. When did you last examine it with a view of accertaining

Ans. how nearly in your opinion said strips of land might be cultivated, up to the road bed?

Ans. I have not examined it since I owned a portion of the land.

Ques. When you owned a portion of the land did you examine that portion so owned by you so as to see within how many feet of the centre line of said rail road the same could be safely cultivated?

and if you say you did then state definiteley at each point along said land the number of feet from the centre line to the point where

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said strip could be safely cultivated?

Ans. I never did examine it so as to tell exactly how many feet, but from the examination made I have estimated it according to the number of feet as heretofore stated.

Ques. Did you make the estimate of the number of feet then or are you making it now simply from your recollection of the looks of the same?

Ans. Of course I made the estimation frequently in passing and cultivating the land.

Ques. At any time when you were cultivating that land did you estimate at the time that you were plowing within fifteen feet of the centre of the rail road track?

Ans. In the field on the north side of the track ~~and~~ I cultivated the land within fifteen feet of the track.

I do not know that I thought of it at the time, but I thought I was cultivating within fifteen feet of the centre line of said road.

Ques. Do you think that it is safe either to the traveling public or to the person and teams cultivating land along by the rail road track to be plowing to within fifteen feet of the centre line of a rail road track on which there are from 10 to twenty trains running daily, and with no fence between the rail road track and the teams?

Ans. I think it is.

Ques. Why then do you say that it is unsafe to cultivate the strip of land which you have described as lying inside of the railroad company's fences as erected by it, and with a fence still between the rail road and the person using the teams?

Because the railroad fence is there and there is no way of getting away from the track, when the trains are passing.

Ques. Why would you want to get away from the track if it is safe to be plowing within 15 feet of the centre line of the track as you have just described above?

Ans. It is not necessary for a man to stand at the track in order to cultivate the ground safely.

Ques. Then do you say it is safe or unsafe to be plowing with a

With a team within fifteen feet of the centre of the rail road track., when a train of cars are passing by you on that track?

Ans. I did not say that it was safe to be within 15 feet of the track when a train was passing. It is not necessary for a man to stand within 15 feet of the track when a train is passing when there is no obstructions, in order to cultivate the land.

It is not safe to be within 15 feet of the track with a team plowing when a train is passing on the track. I make the above statement

~~Ques.~~ that it is safe to ~~be plowing within~~ cultivate within 15 feet of the track beacuse I have cultivated it that close.

Ques. Are you certain that you ever cultivated within 15 feet of the centre line, and did you accertain that fact from actual measurement, or are you simply giving your opinion?

Ans. I just make this statement from estimate, I never did measure any of it.

Ques. Why do you say, or why would it be in your opinion unsafe for a man to be plowing within fifteen feet of the centre line of a rail road while trains were passing him on that rail road?

Ans. The team might possibly become frightened and want to run away or possibly run into the train.

Ques. You say in answer to a question propounded to you on your examination in chief that there are four cuts on the Ball land, where is the first cut as you go west from the W.W. Bales line?

Ans. the first one is west of the crossing at the Ball and snavelly store.

Ques. How deep is that cut?

Ans. I suppose it is 10 or 12 feet.

Ques. How far is it from the outer edge of that cut on the north side to the centre line of the rail road.

Ans. I think it would be from 20 to 25 feet.

Ques. is there any other cut as deep as this one, if so where is it?

Ans. There is one or possibly two that are deeper. The first one of these and the deepest is west of the grave yard and east of the culevert which is nearly opposite John Balls, this one on the north runs back 40 or forty five feet from the centre of the track, and

I would say

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it is possibly 100 yards through it, or more. & This cut is also on the Ball land. Just west of this there is another cut ~~xixm~~ about the same length of the last one. This cut is not so deep as the last one described and the slope runs back on the north side about 20 to 30 feet. I don't remember that there is very much slope on the south side of either of these, I don't remember much about it. This last named cut is on the Ball land.

Ques. You have also stated in answer to said Question in your examination in chief that there are three fills on the Ball land, one of which is small, please state where the first fill is going westward, from the Bales land, state the length of that fill and the height of it.

Ans. The first fill commences a little west of the cut which I have described as being just west of the crossing at Ball and Snavels store and runs across the arch culvert a short distance, and I suppose it is something like 100 yards long, and in the highest place 100 feet high, sloping each way.

The next fill commences west of the grave yard and runs pretty well to the east end of the big cut that I have described above. This fill is about 400 yards long, and is about from 8 to 12 feet high.
Ques. State as nearly as you can the width of these two fills at the top.

Ans. I think they will average about 16 feet.

Ques. Do you know, or can you give me any thing like a correct estimate of the width of the fill at the bottom?

Ans. I can not.

Ques. You state that on the Kincaid land there is a cut running across the crossing known as the Wynn crossing, please state the total length of that cut, embracing both sides of the Wynn crossing and the depth of it as nearly as you can, also the distance on each side of the outer edge of the slope from the end of the ties.

Ans. I would think that it was something near a quarter of a mile. It runs nearly two thirds of the way through the Kincaid land. The depth of it at the highest point I estimate to be 8 to 10

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feet. The deepest part of the cut is about one third of the way through it, and runs about 100 yards about the same depth, and then slopes gradually on the east end and abruptly on the west end. From the end of the ties to the outer edge of the slope on the north side at the deepest place I would estimate it to be about 20 feet. And on the South side it would be about 15 feet.

Q es. Now you may state how close you can plow to the edge of a fill without injury to the ~~fill~~ cut.

Ans. This will depend to a large extent on the character and shape of the ground, where the drain of the water is away from the cut you can plow closer to the edge of it than where the drain is toward the cut. On the south side of the cut on the Kincaid land and west of the crossing while I owned the land I plowed within two feet of the brink as I recollect of the edge of the cut. On the north side where the drain of the water is toward the cut I plowed I think within 5 feet of the cut.

Ques. please state If the company has erected any fence on the Kincaid land where that fence begins and where it ends on each side of the road west of the Wynn crossing.

Ans. They have not that I know of.

Ques. Now you may answer the same question beginning ~~on~~ at the Wynn crossing and going ~~eastward~~ eastward.

Ans. They have from the Wynn crossing to the east line of the Kincaid land, and they have also erected a fence on the other side of the track, that is on the north side of said track, from the same points. The Wynn crossing is I think about midway of the Kincaid land as the rail road runs through it.

Ques. ~~are~~ the old fences that you have described as having been erected by M.S. Ball or the parties under him, still standing on this Kincaid land.

Ans. I do not think they are ~~xxx~~ east of the crossing, they are standing west of the crossing.

~~Ques. Who removed these fences erected by Mr. Ball and which~~

stood east of the crossing?

Ans, I do not know.

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Ques. Were they removed before or after the railroad company erected its fences east of said crossing?

Ans. I do not know when they were removed or by whom.

Ques. Where does the fences erected by the railroad company on the Ball piece of land begin and where do they end?

Ques. ~~There is a fence~~ there is a fence on the south side of the road beginning at the west line of the Ball land and running to a point about opposite the grave yard.

Ques. Now does this fence stand on the outer edge of the right of way all the way along there?

Ans. I do not think it does at a place or two where the creek runs on the right of way said fence is between the creek and the road.

Ques. Did Mr. Ball ever have since the said rail road was constructed any fence along the rail road and parallel with this fence erected by the rail road company?

Ans. I do not remember that there was.

Ques. Could there be any safe cultivation by plowing with a team on the rail road company's right of way along where said company has built its fence taking into consideration the location of the creek along it? and if you state that there could have been then please state at what point or points?

Ans. I think there could. I think without the fence there it could have been plowed from the Kincaid line to where the creek comes to the rail road, a distance of possibly about a ~~xxxx~~ half mile.

Ques. ~~Does the fence~~ Does the fence erected by Mr. Ball, if any was erected by him from the east line of the Kincaid line on the north side of the road where the rail-road company has no fence, still stands where it was erected by him and how far did that fence extend eastward from said Kincaid line?

Ques. I think the fence still stands, and I would think it was about 4-5 of the way through the farm, and stops at the arch culvert west of the store.

Ques. From the culvert just designated by you to the public

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road crossing, have any fences been erected by any body on either side of the railway, if so by whom?

Ans. there has been none.

Ques. From the West line of the W.W. Bales land to the public road crossing near the store have any fences been erected since said railroad was built, if so by whom?

Ans. there is a fence on each side of the road, I think it was put there by Mr. Ball.

Ques. Now if I understand you correctly, there are no fences on either one of these tracts of land inside of the railroad fences, is this correct?

Ans. This is correct as I remember.

Ques. Now you say that Mrs. Ball and Mrs. Kincaid are damaged because of the fences erected by the railroad company, and you say this is done because some valuable land is cut off from their farms by said fences, will you state how much land is thus cut off by the fences erected by the rail road company on the Kincaid place? that could be cultivated safely if said fences were not there.

Ans. I would ~~be~~ suppose that it would amount from two to three acres on the Kincaid land. I do not know much how to estimate it.

Ques. Please give me an estimate of how much is cut off by the one fence on the Ball land that could be cultivated safely if that fence were not there.

Ans. I hardly know, but I think that possibly it would be from 2 to 2 and one half acres.

Ques. What proportion of the entire right of way from the Bales line to the Snavelly line could be safely cultivated if the rail road company had no fence there?

Ans. I think about one half.

Ques. You state, if I understood you correctly, that the cultivation and use of the right of way on the outside of the track and where it could be cultivated would prevent the accumulation of inflammable material, now does not this depend upon how it is cultivated?

Ans. No. not altogether.

Ques

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Most any kind of cultivation is better than none. to prevent the accumulation of infalamable matter.

Ques. Suppose it was allowed to grow up in grass and weeds and this grass and weed allowed to die and fall down upon it, would not the danger of fire be much greater than if it was cultivated in corn, or if it was pastured, or if it was mowed off and kept clean?

Ans. Certainly it would.

Ques. Q Would not the danger of the collection of inflamable material on the right of way be much grater from oats and wheat than it would be from pastureage or cultivation in corn?

Ans. It would.

QUEST

RE-DIRECT EXAMINATION.

Ques. State whether or not from your observation of the way in which the right of way is kept by said company and your observation of the manner in which it is cultivated by these parties does not the cultivation and use of said right of way lessen the danger from fires from said trains?

Ans. I think it lessens it to a considerable extent.

A

Re Cross examination.

Ques. Have you observed how said right of way was kept? as to inflamable material accumulating upon it where the road was fenced and entirely under the contrall of the rail road company, and if you state that you have state where?

Ans. I have to some extent. There is a piece of road down this side of Shawanee that has been under fence some time and some through the Taylor land and on the Bales land.

Ques.

Now is it not a fact that the rail road company mows, cleans off and removes all inflamable matter every fall?

Ans. I think they trim the right of way off once a year, and I think it is done in the latter part of the summer or fall.

~~And further this deponent saith not.~~

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RE-RE-Direct examination.

Ques. State whether or not after said company mows their said right of way that the fine grasses are allowed to die and accumulate on said right of way and also sage grass and crab grass are allowed to grow up and remain on said right of way?

Ans. There is to some extent.

Re-Cross Examination.

Ques. Does not the same thing occur when land has been cultivated in wheat or oats?

Ans. frequently crabgrass grows up.

Ques. suppose it was in meadow, would not the same thing happen as to sage grass.

Ans. It would if it was not mowed off or pastured.

And furthur this wi ness saith not.

Witness Claims
2 days \$1.00

W.E. Wynn

Virginia, Lee County, to-wit:

I, H.C. Joslyn a Justice of the Peace ~~notary public~~ in and for the County of Lee

in the State of Virginia, do certify that the foregoing depositions of J.M. Wheeler and W.E. Wynn were taken, sworn to and subscribed before me at the times, places and for the purposes in the caption mentioned.

Given under my hand this the 29th day of October, 1901.

Witness Claims
2 days \$1.00

H. C. Joslyn J.P.

B.F. Kincaid another witness after being duly sworn deposes as follows:

Q.1.-- State your age, occupation and place of residence.

A.-- I am 41 years old, occupation farmer and grazer, residence Tving Virginia.

Q.2.-- Are you related to the plaintiffs in these caues and if so state in what way?

A.-- I am. Mrs. Ball is my mother-in-law, and Mrs. Kincaid is my wife.

Q.3.-- Are you acquainted with the lands claimed by the plaintiffs in these causes through which the right of way of the defendant company runs in this County, beginning at the west line of the W.W.Bales land on the east and running to the lands of G.S.Snavely on the west, and if you are state what part is claimed by Mrs. Ball and Mrs. Kincaid

A.-- I am acquainted with said lands and have been for about ten years and have also been acquainted with said right of way that long. Mrs. Ball owns from the W.W.Bales line to what is known as the Wynn or Gray land and to the end of the fences put up by the railroad company beginning at and running eastward from the Wynn crossing; Mrs. Kincaid owns from that line westward to the Snavely line.

Q.4.-- The description just given by you embraces the tracts or parcels of land as claimed by the plaintiffs and alleged in their bills does it not?

A.-- It does.

Q.5.-- State whether or not you have observed the operating and running of said Company's train on said right of way through said land, and if you have state how long and the opportunities you had for watching and observing the operations of said trains thereon?

A.-- I have observed the operations of the company's trains on said right of way, for the last ten years. I have lived in sight of the road all of this time and on the land ~~in question~~ through which the right of way runs, and I have been around about the right of way every few days off and on for the last ten years, and have seen the trains passing on the said track

Q.6.-- Do you know the width of the right of way through these lands, and if you do state what it is?

Obj.-- The foregoing question is objected to because the deeds referred to and filed as exhibits with the bill are the best evidence of the width of the right of way.

C.T.Duncan for L. & N. R.R.Co.

A.-- I do not know the width of said right of way, but the railroad claims 50 feet on each side of the ~~track~~ center of the track.

Q.7.-- Do you know where the outer edge of this 50 feet strip on each

side of the center line of said right of way is?

A.-- I do, where they put up their wire fence.

Q.8.-- After the construction of said railroad on said right of way through said land and since said company has been operating and running trains thereon, state whether or not M.S.Ball, or those claiming under him have been cultivating or using any portion of said right of way, and if so to what extent, that is, speaking with reference to both sides of said road bed?

A.-- Said persons have been using said right of way. Portions of it have been tended up to within fifteen feet of the center line of the road bed on both sides, and some other places not so ^{close} ~~much~~. This cultivation was on the right of way both through the Mrs. Ball tract and the Mrs. Kincaid tract.

Q.9.-- When did this cultivation and use of said portions of said right of way begin and how long has it continued?

A.-- They began to use said portions and cultivate it immediately after said road began to be operated, and has been continued something over ten years.

Q.10. State whether or not this cultivation use and enjoyment of said right of way by said parties has been done with safety both to themselves and with safety to said Company in operating said trains?

Obj.-- The foregoing question and any answer thereto is objected to because the question calls for an opinion and he has not shown that he is an expert an entitled to an opinion as to the safety of operation to the defendant Company.

C.T.Duncan for deft.

A.-- It has because our hands have tended it and our renters have tended it and they have never had any bad luck yet.

Q.11.-- State whether or not said Company ever made any objection to said parties using and cultivating said portions of said right of way, and if so when said objection were made and state how long said right of way was used and cultivated without any objection on the part of said company?

A.-- There was no objections made until they put up their fence. After fences were put up they ordered our renters out ~~and~~ as I am informed.

The right of way was used without objection until last Spring. I met Mr. Blessing on the track and he ordered me to take the rails away and said if I didn't take them away he would burn them. I told him that that was out land and that I dared him to burn them and that I would not move them until it suited me. Mr. John W. Blessing, referred to just above, was a section boss for the Louisville & Nashville Railroad Company, on the section running through said lands.

Obj.-- So much of the foregoing answer as undertakes to detail the information outside of what the witness received from the section foreman is objected to because hearsay.

C.T. Duncan for deft.

Q.12.-- State whether or not M.S. Ball and those claiming under him ever constructed fences on said right of way and if so where were said fences built, and how far said fences were built on said right of way, giving the points where they began and where they ended with reference to both the lands of Mrs. Ball and Mrs. Kincaid?

A.-- M.S. Ball did construct fences, on both ~~px~~ the Ball part and the Kincaid part, that is he and those claiming under him. As to the right of way through the Ball land the fences began at the W.W. Pales line on both sides of track and extended Ball & Snavely's store. As near as I could measure the fence on the south side was about 20 feet from the center line of the track, and on the north side about 25 feet from the center of said track. ~~At the culvert west of the store~~ From Ball and Snavely's store to the arch culvert west of said store there was no fences built. From this culvert on the north side the fence extended to the Kincaid land line, being a distance of about 3/4 of a mile, this fence was a distance from the center line of the tract, from the culvert to the big cut, of about 25 feet, then from the big cut over to a crossing on the Ball land it was 25 to 50 feet from the center of said track, from this point on to the Kincaid land the said fence is about 20 feet from the center of said track. From the arch culvert to the Kincaid line there was no fence on the south side of the track erected by Mr. Ball or any one claiming under him. As to the right of way through the Kincaid land the fence began on the Ball line ~~and~~, that is on the north side of the track, and extended

to a culvert said fence being about 150 yards in length. This fence was about 20 feet from the center of the track, From said culvert to the Wynn crossing there was a fence on the north side of the track which was about 15 feet from the center of the track. On the south side of said track the fence began on the Ball line and ran to the culvert a distance of about 150 yards, which fence is about 15 feet from the center of the track, fence then extends from said ~~crossing~~ ^{culvert.} on the south side to the Wynn crossing, and is a distance from the center of the track of about 40 feet. From the Wynn crossing to the ~~on the north side of the track~~ Snavelly line there is a fence, which averages from 25 to 30 feet from the center of the track, and from the Wynn crossing to the Snavelly line there is no fence on the ~~Snavelly line~~ south side.

Q.13.-- While these fences were built on said right of way, state whether or not the said Ball and Kincaid or those claiming under them had cultivated and used said right of way with safety up to said fences?

Obj.-- The foregoing question in so far as it asks for an opinion or statement as to the safety with which said cultivation was done is objected to because the answer would necessarily be the opinion of the witness as to the safety of said use and cultivation in so far as the railroad and its operation is concerned.

C.T.Duncan for deft.

A.-- Yes sir.

Q.14.-- How long did these fences remain on said right of way, and have any of them been removed, and state how long the said parties cultivated and used said portions of said right of way up to said fences?

A.-- Said fences have been on the right of way from eight to ten years and some of them have been removed within the last twelve months. Said parties used said land up to said fences from eight to ten years. ~~They used~~, that is they cultivated and used the lands up to said fences from the time they were constructed until the present as to such as are still there and until they were removed as to such as have been removed.

Q.15.-- During the said time that said parties have cultivated and used said right of way up to said fences, state whether or not the said Company has made any objection or complaint to the said use and cultivation of said right of way?

A.-- They did not.

Q.16.-- State whether or not the defendant Company built or had built any fences on said right of way through said lands and if so at what point on said right of way have said fences been built, and give the length of said fences if you can?

A.-- They have built fences on said right of way. They started on the south side at Ball grave-yard westward to the Kincaid line. The best observation I can make with my eye they have this fence fifty feet from the center line of the track except in a few places where it runs along the creek they have set it in a little on account of the creek. This is all the fence the Company has constructed on the Ball tract. On the Kincaid land said Company has constructed fences from the Ball line westwardly to the Wynn crossing on both sides of the track, and these fences on both sides are fifty feet from the center line of the track from the best observation I can make with my eye. This is all the fences constructed by said Company on said right of way. The fence constructed by the said Company on the Ball lands was built something over two years ago; the fence built by said Company on the Kincaid land were built in the summer of 1900.

Q.17.-- State whether or not the fences built by said Company are parallel to any of the fences built by Ball and Kincaid or parallel to any fence that they had built, and if so state where they are parallel to any of said fences or to the fences where they have been removed?

A.-- The fences constructed by the railroad company are practically parallel with the fences which Ball and those claiming under him had on the Kincaid piece, except that the fences constructed by the Company are the same distance from the center line of the track all the way along, while the fences as put up by Ball and those claiming under him were closer to the center line at some places than they were

at others, as heretofore explained by me, in giving the distances of said fences from the center line. On the Ball land as heretofore explained by me, along where the railroad company has erected its fence Mr. Ball had not constructed any fence on the south side of the railroad track. On the Kincaid land where the Company has constructed its fences as above detailed, the rail fences theretofore erected by Mr. Ball and those claiming under him have been removed, except that there is perhaps something like a load of rails still remaining along there.

Q.18.-- State whether or not the space on said right of way between the fences built by Ball and Kincaid and by the said Company could have been cultivated, used and enjoyed with safety?

Obj.-- The foregoing question and any answer thereto are objected to as evidence because the question asks for the opinion of the witness and its not competent for him to give an opinion on the same unless he is shown to be an expert in the construction and operation of railroads.

C.T.Duncan for deft.

A.-- It could not.

Q.19.-- State whether or not the fences built by said Company interfere with and prevent Messrs Ball and Kincaid from the cultivation use and enjoyment of said right of way?

Obj.-- Objected to , first, because immaterial, second, because it asks for the opinion of the witness instead of asking for facts.

C.T.Duncan for deft.

A.-- It does.

Q.20.-- By being thus prevented from the cultivation and use of said right of way, are said parties damaged thereby?

Obj.-- Objected to because immaterial, and because it asks for an opinion instead of fact.

C.T.Duncan for deft.

A.-- They are. They are prevented from tending some valuable land

Q.21.-- If said Company should construct fences on both sides of its track, on the outer edge of said right of way for its entire length state whether or not that these fences would prevent them from the use and cultivation entirely from some portions of said right of way on ac

count of some cliffs and rocks and a creek running near the right of way?

Obj.-- Objected to because immaterial and irrelevant.
C.T.Duncan for deft.

A.-- Yes sir.

Q.22.-- State whether or not the cultivation and use of said right of way prevents the accumulation of inflammable material thereon?

Obj.-- Objected to because the answer can be nothing more than the opinion of the witness.

C.T.Duncan for deft.

A.-- It does.

Q.23.-- Give your reasons for this statement.

A.-- Where we cultivate it it keeps the weeds and grass from accumulating, and where we graze it it keeps the grass and weeds from accumulating and in this way prevents fire. Where we pasture land the fire hardly ever catches.

Q.24.-- Up to what distance from the center line of the road bed could said entire right of way be safely cultivated and used through said land on both sides of said road bed as the road is now constructed and operated, giving the distances both on the Ball and Kincaid land?

A.-- Starting at the W.W.Bales line on the north side running to the Ball and Snavelly's store, I measured it and it could safely be cultivated to within 18 feet of the center line of said track, and on the south side I measured it and it could be safely cultivated between said Bales line and said store up to within 15 feet of the center line of said track. Then starting on the north side at said store running to a private crossing it could be safely cultivated within 25 feet of the center line of said track. On the south side between said store and the said private crossing said right of way could be cultivated for about 100 yards to a cut within 15 feet of center line of track, and including and from ^{and including} this cut to said private crossing it could be safely cultivated to within 25 feet of said center line. From the said private crossing to the arch culvert said right of way could be cultivated ~~edg~~ on both sides up to within 15 feet of said center line. From the arch culvert to the a fill on the north side it could be cultivated up to

within 25 feet of said center line. Between said points on the south side about 30 yards could not be cultivated at all on account of rocks and cliffs and the creek, then for about 100 yards it could be cultivated for about 25 feet and the balance of the way about 20 feet. From this fill on the north side for about 300 yards to a big cut it could be cultivated up to within 20 feet of the center line, and from the big cut of the the Ball crossing ~~25~~ 25 to 50 feet, and from this crossing to the Kincaid land could be cultivated to within 20 feet of said center line. From the said fill, on the south side, to the big cut, except at one place for about 20 feet which could not be cultivated at all on account of the creek, it could be cultivated with safety to within 20 feet of the center line, and from the big cut over to the Ball crossing it can be cultivated with safety to within 33 feet of the center line, practically. at some places it might be cultivated a little nearer and at some places it could not be cultivated at all, and from the Ball crossing to the Kincaid line it could be cultivated to within 20 feet of the said center line. On the Kincaid part on the north side to the Wynn crossing said right of way could be cultivated to within 15 feet and from the Wynn crossing to the Snavelly line 15 feet except at the cut and there would be 25 feet. This cut is about 200 yards long. On the south side from the Ball line to the culvert 15 feet, and from the culvert to the Wynn crossing 20 feet, and from the Wynn crossing to the Snavelly line 20 feet.

Cross Examination.

X.Q.1.-- You speak of making measurements, when did you do this and who was present and assisted you?

A.-- I made these measurements on the 18th of October, 1901, and T.S. Snavelly was present ~~part~~ all the way and Mr. William A. Crockett and Mr. M.S. Ball were there part of the time.

X.Q.2.-- Were any of the officers, agents or employees of the Railroad along? or had you given them or any of them notice that you were going to make said examination and measurements and invite them to be present?

A.-- There were none of them along, nor did I invite any of them or give them any notice that I was going to make said examinations or measurements.

X.Q.3.-- You have been giving your personal attention to this case and acting as the agent of your wife and your mother-in-law, Mrs. Ball, in its management, have you not?

A.-- Yes.

X.Q.4.-- What did you make said measurements with?

A.-- With a surveyors chain, that is a link chain.

X.Q.5.-- Did that chain have on it a designation of feet and inches?

A.-- It had notches on it for feet.

X.Q.6.-- How long was that chain and how many of these little notches or tags had it on it?

A.-- It was two rods long, I don't remember how many notches it has on it but I think some four, five or six.

X.Q.7.-- You state if recollect correctly that Mr. Ball has fences erected on each side of the track on the land or right of way between the W.W. Bales line and the public road crossing at Ball & Snively's store. Did you measure the distance ^{from} ~~of~~ one of these fences to the others, if you did state how many chains, or parts of chains it was. from one of said fences to the other?

A.-- We did not measure the distance from one of these fences to the other, but I did measure from the center line of the railroad to ~~each~~ ~~the fence on south side~~ the fence on south side and found it to be 20 feet

X.Q.8.-- ~~Did~~ In making your measurements did you measure the width at the widest place of the cut just west of Ball & Snively's store, or of any of the other cuts along the railroad line on either one of the tracts of land in controversy, if you did please state such width?

A.-- ~~I did measure the width of the cut just west of Ball & Snively's store~~ We did not measure any of the cuts. What measurements I made were from the center of the track to the top of the cuts, some times our measurements would extend a little out from the top so as to make the measurement in feet without any addition of inches. In measuring the cut west of said store from the center line to the outward edge of the cut on the north side was about 22 feet, on the south side about 22 feet. The next cut going west is much higher on the north side than on the south side, in fact there is not much cut there on the south side. From the center line to the edge of this cut on the north

is about 24 feet, and on the south side ~~xxxx~~ it is about 20 feet.

The next cut going west is what we call the big cut and from the center line to the outer edge of it on the north side is 45 feet and on the south side it is 33 feet.

X.Q.9.-- Did you measure or do you know the highth of the highest fill

A.-- We did not measure it, I do not know it highth, but estimate it to be about ten feet.

X.Q.10.-- Did you measure the width of this fill on top~~x~~ or bottom?

A.-- I did not.

X.Q.11.-- How close up to ~~xxxxx~~ the edge of a cut can you plow without interfering with the edge of the cut, or rolling dirt down the sides of it?

A.-- That is owing to the ground, some of it rolls away from the railroad and some towards it. Where the land is rolling away from the railroad you can go two or three feet from the edge, if it is rolling towards the railroad you can plow within thee or four feet of the edge

X.Q.12.-- On the Kincaid land you have stated that M.S.Ball and those claiming under him had erected fences on each side of the railroad run-
from the Wynn crossing
ning eastward, a considerable distance. While making your measurements did you measure from the center line to where these fences stood, if you did please state what the distance was at the various places where you measured, if you measured more than one place?

A.-- We did not measure frrom the center line to where the fences stood at any place, but the measuring we did was to points that I though might be safely cultivated to and this measurement has been given in answer some of the question propounded to me on my examination in chief.

X.Q.13.-- In that answer , if I understood you correctly, you stated that you thought there were places along ~~xxxxx~~ the right of way where said right of way could be cultivated up to within 15 feet of the center line. Do you think that it would be safe to be plowing with a team within fifteen feet of the railroad track while a train was moving by you on that tract?

A.-- It would not.

I could have gotten out of the way till the train passed and then went back and went to plowing.

X.Q.14.-- Has any cultivation been done by Mr. Ball or any person claiming under him of any part of the right of way within 15 feet of the center line at points where no fence was between the railroad and the land thus cultivated?

A.-- I think not, my estimate would be that the closest cultivation that has been done was 18 to 20 feet from the center line.

X.Q.15.-- In answer to a question propounded to you, you state that since the fences were erected by the railroad Company that you do not think the land inside those fences can be safely cultivated. Why not?

A.-- I do not think it would be safe because cultivating that close to the railroad the team would be liable to be frightened and then with the fences there it would be hemmed in and think make it more dangerous than if the fences were not there. With the fences there you could not escape with a frightened team.

X.Q.16.-- Suppose that the tillable part of the right of way inside of said fences was set in meadow grass, could they not be used very profitably?

A.-- They could not.

X.Q.17.-- Why not?

A.-- Simply because one would have to go in there to mow it and he might be hemmed and couldn't get out if the team became frightened.

X.Q.18.-- Couldn't it be mown very well and made very profitable by hand, scythe and man power.

A.-- It could but it would be right expensive as hand are hard to get, and it would also have to be packed and thrown over the fence.

X.Q.19.-- For what purpose is the land adjoining the railroad on the north side on the Kincaid used?

A.-- It is used for corn, wheat, oats and grass. This year the land west of the Wynn crossing is in wheat, before the wheat was sowed it was in grass and used for grazing. On the east of the crossing it is used for grazing. On the south side of the road ~~west~~^{east} of the crossing it used for grazing, but it is my purpose next year to cultivate it in *corn*

West of the crossing on the south side we use for grazing.

X.Q.20.-- You may now state for what purposes the land on each side of the railroad is principally used on the Ball land?

A.-- It is used for general purposes, corn, wheat, oats and grass. We rotate the crops and perhaps we have it in grain of some kind about once ever three years.

X.Q.21.-- You give it as your opinion that cultivation and use prevents the accumulation of inflammable material on the right of way. Does this not depend upon how it is cultivated, what it is cultivated in and how it is used?

A.-- Yes, it depends on what it is put in. If it is put in corn it don't accumulate much, if it is put in wheat or oats it accumulates more, if grazed it is cleaner than either

X.Q.22.-- What kind of fencing were those erected by Mr. Ball and those claiming under him on the right of way?

A.-- Rail fences principally, and a little wire fence. From the W.W. Bales line to the crossing at Ball & Snively's store it is a wire fence

X.Q.23.-- What sort of rail fences were they, did they prevent the passage of stock from the fields enclosed by them to the right of way?

A.-- It has been a good fence all along and turned stock, but some of it is now giving away, that is in places where the land is in cultivation.

X.Q.24.-- Did any of your stock ever get over these fences and get killed on the railroad?

A.-- Not that I know of.

X.Q.25.-- Is there a line of telegraph poles on the right of way along though the Ball and Kincaid lands

A.-- There is.

X.Q.26.-- On which side of the railroad are these poles erected, state their distance from the center line and also state if there is wires on the poles which are used as a telegraph line?

A.-- My best recollection is that they are on the north side. I know that part of them are on the north side. My best recollection is that they are about 25 feet from the center line. They have wires on them

that I suppose are used for telegraph purposes.

Re Examination.

Q.-- How many acres or in other words what proportion of the right of way through said two tracts of land could be cultivated and used with safety?

A.-- I think that from 8 to 10 acres could be safely cultivated and used ~~with safety, and from 10 to 12 acres on the right of way.~~ My opinion is that half or more of it could be safely cultivated and used.

And further this deponent saith not.

B. F. Kincaid

Virginia, Lee County, to-wit:

I, Geo. P. Cridlin, a notary public in and for the County of Lee in the State of Virginia, do certify that the foregoing deposition of B. F. Kincaid was taken sworn to and subscribed before me on the 30th day of October, ¹⁹⁰¹ at the office of C. T. Duncan in the town of Jonesville, Virginia, for the purpose of being read as evidence in behalf of the plaintiffs in two certain suits in chancery now depending in the Circuit Court of Lee County of N. A. R. Ball et als against Louisville & Nashville Railroad Company and Martha E. Kincaid et als against the Louisville & Nashville Railroad Company.

Given under my hand this the 30th day of October, 1901.

Geo. P. Cridlin N.P.

Ball + Kincaid

v2 { Depo.

L. T. N. R. R. Co

Wrt:

W. E. Wynne \$1.00

J. W. Wheeler 3.56

Justice H. C. Joslyn's
fees for taking depo \$7.50

Cr. by cash paid by
B. F. Kincaid \$2.25

\$5.25

Wrt. B. F. Kincaid

N. P. Geo. P. Cridlin
fee for taking depo.

5 hours \$3.75
paid by B. F. Kincaid

4 P & N P 11.25
wits 4.56
\$15.81

Received from Geo. P. Cridlin
notary public before whom
taken and filed Nov. 2nd
1901 A. B. Munsey clerk.

The Commonwealth of Virginia,

To the Sheriff of the County of Lee---Greeting:

WE COMMAND YOU THAT YOU SUMMON

*Louisville & Nashville
Railroad Company, a Corporation*

to appear at the Clerk's office of the Circuit Court of the County of Lee at the court-house thereof, at the Rules to be holden for said Court, on the *3rd* Monday in *October 1900*, ~~189~~ to answer a bill in chancery, exhibited against *It* in our Court by

B. F. Kincaid and Martha E. Kincaid

And have then there this writ. Witness, A. B. MUNSEY, Clerk of our said Court, at the court-house, the *2nd* day of *October 1900* ~~189~~, and in the 12^{*th*} year of the Commonwealth.

A. B. Munsey

Clerk.

A copy—Teste:

Clerk.

B. F. + M. E. Skircaid

VS. { SUBPOENA
IN CHANCERY.

L. + N. R. R. Co

Bullitt + Kelly +
B. H. Sewell p. q.

To 2nd Oct Rules, 1900

CIRCUIT COURT.

There being no President, Cashier, Treasurer, General Superintendent, or any of the Directors of the Louisville + Nashville Railroad Company found in or resident of my County, Lee County Virginia, I executed the within Subpoena in Chancery, by delivering an attested office copy of the same, on the 4th day of October 1900, to E. B. Mouser, Depot Agent of said Louisville + Nashville Railroad Company, at its depot, at Remington Gap in Lee County Virginia, the said E. B. Mouser being a resident of said County, and said depot being the place of business of the said Louisville + Nashville Railroad Company of said E. B. Mouser agent as aforesaid. This the 4th day of October 1900.

W. J. Milham, J. C.